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14 UNITED STATES DISTRICT COURT
15 FOR THE CENTRAL DISTRICT OF CALIFORNIA

16 UNITED STATES OF AMERICA, ED CR No. 18-231-JGB
17 Plaintiff,
18 v.
19 JOHN JACOB OLIVAS,
20 Defendant.

21 GOVERNMENT'S OPPOSITION TO
22 DEFENDANT'S AMENDED MOTION IN
23 LIMINE TO EXCLUDE OR LIMIT "SEXUAL
24 ASSAULT EXPERT" TESTIMONY (DKT.
25 83); EXHIBIT 1

26 Hearing Date: November 15, 2021
27 Hearing Time: 2:00 P.M.
28 Location: Courtroom of the
Hon. Jesús G. Bernal

24 Plaintiff United States of America, by and through its counsel
25 of record, the Acting United States Attorney for the Central District
26 of California and Assistant United States Attorneys Eli A. Alcaraz
27 and Frances S. Lewis hereby files its opposition to defendant's

1 amended motion in limine to exclude or limit "sexual assault expert"
2 testimony (dkt. 83).

3 This opposition is based upon the attached memorandum of points
4 and authorities and the attached Exhibit 1, the files and records in
5 this case, and such further evidence and argument as the Court may
6 permit.

7 Dated: October 26, 2021

Respectfully submitted,

8 TRACY L. WILKISON
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10 SCOTT M. GARRINGER
11 Assistant United States Attorney
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13 /s/
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant John Jacob Olivas ("defendant") used his position and power as a federal law enforcement agent to sexually abuse two of his intimate partners and prevent them from reporting violence to law enforcement. Defendant's abuse of his federal law enforcement authority violated the victims' constitutional rights: namely, their rights to liberty and bodily integrity.

At trial, the government intends to introduce expert testimony from Dr. Janine S. Shelby, Ph.D, to explain primarily to the jury why victims of sexual abuse may behave differently from common sense expectations. The government has provided defendant with (1) a four-page July 8, 2019 expert notice with accompanying 25-page curriculum vitae for Dr. Shelby; (2) a 25-page October 13, 2019 expert report that provides detailed explanations to the opinions in the expert notice and cites to various publications and manuals, among other things, and (3) over 1,200 pages of materials listed in Dr. Shelby's curriculum vitae.

Dr. Shelby is a trauma psychologist, with over 20 years' experience helping victims of sexual assault. She began her career as the Clinical Director of the Santa Monica-UCLA Rape Treatment Center, where she oversaw adult outpatient psychotherapy services, school-based education and rape prevention programs, and emergency crisis response systems for sexual assault survivors. Dr. Shelby is expected to offer her professional opinions as to the experiences and characteristics of victims and perpetrators of sexual assault and trauma to help account for how such victims respond and react to such trauma. Dr. Shelby will not testify about the application of her

1 opinions to the facts of this case, whether the victims are credible,
2 or whether their behavior is consistent with the behavior of other
3 victims of sexual abuse.

4 Defendant now moves in limine to exclude all of Dr. Shelby's
5 testimony. ("Motion," Dkt. 83.) Relying on nearly identical
6 objections, defendant argues that seven of the noticed topics, which
7 relate to characteristics of victims experiencing intimate partner
8 violence, are excludable under Rules 701-704 as outside the need for
9 expert testimony, outside of Dr. Shelby's expertise, and unduly
10 inflammatory under Rule 403. (Mot. at 7-12.) Defendant does not,
11 however, challenge the relevance of these topics under Rules 401 and
12 402. Defendant's relevance challenge is limited to two specific
13 topics, which relate to Dr. Shelby's anticipated testimony about the
14 perpetrators of intimate partner violence. (Mot. at 5-7.) Fatal to
15 defendant's Motion, his challenge appears to focus exclusively on the
16 July 8, 2019 expert notice without any consideration whatsoever to
17 the 25-page October 13, 2019 expert report or the over 1,200 pages of
18 supporting presentation and other materials provided. For the
19 reasons set forth in this opposition, the Court should deny
20 defendant's Motion.

21 **II. BACKGROUND**

22 In July 2019, the government sent defendant a four-page letter
23 providing notice that it intended to call either in its case-in-chief
24 or in rebuttal Dr. Janine S. Shelby, Ph.D. (Mot., Ex. A.) The
25 government noticed nine specific topics, seven of which relate to
26 common characteristics of victims experiencing intimate partner
27 violence and two of which relate to common traits of perpetrators of
28 such violence. The noticed topics included, in sum:

- 1 (1) common responses victims have to sexual assault and the
2 reasons why victims do not report or report domestic
3 violence in piecemeal fashion;
- 4 (2) the influence of various factors, such as cultures, mental
5 health, and family dynamics on how victims respond to
6 sexual assaults and why that may cause victims to remain
7 silent;
- 8 (3) the roles that power imbalances and control dynamics play
9 in interpersonal relationships and how victims may respond
10 to sexual assault;
- 11 (4) the roles that stigma and a sense of shame may play in how
12 victims interact with their abusers;
- 13 (5) reasons why victims of sexual assault may delay or forego
14 reporting, including a desire to avoid retaliation or
15 stigmatization and dissociative coping mechanisms, such as
16 a desire to re-interpret sexual assaults as consensual acts
17 to avoid facing the reality of an abusive relationship;
- 18 (6) reasons why victims of sexual assault may remain in an
19 abusive relationship despite continuing to suffer at the
20 hands of the abuser;
- 21 (7) coping mechanisms for victims of assault, including denial,
22 wishful thinking, and avoidance;
- 23 (8) characteristics shared by domestic violence perpetrators,
24 including mental health or personality disorders,
25 acceptance of male dominance ideology, narcissism, and
26 sexual arousal linked to aggression or violence; and
- 27 (9) typical methods by which some perpetrators of domestic
28 violence and sexual assault gain and maintain power and

1 control over victims, including by creating some form of
2 dependency, isolating the victim from family and friends, a
3 gradual escalation in abuse, and undermining the victim's
4 sense of self-esteem.

5 (Id.) The government also provided defendant with Dr. Shelby's 25-
6 page curriculum vitae.

7 The government further supplemented this notice in February 2020
8 when it produced a detailed 25-page October 13, 2019 report by Dr.
9 Shelby identifying all of the materials she reviewed in support of
10 her opinions and a thorough recitation of her opinions and the bases
11 for them, with extensive citations to her own personal experience as
12 well as research studies in her field. (Ex. 1 ("Shelby Report").)
13 Defendant does not cite to the Shelby Report when objecting to the
14 introduction of her opinions, instead referring only to the four-page
15 notice the government sent in July 2019.

16 On July 7, 2021, in response to defendant's supplemental
17 discovery request for materials from Dr. Shelby's curriculum vitae,
18 the government produced over 1,200 pages of presentations, trainings,
19 and other materials prepared by Dr. Shelby reflecting some of her
20 work in this space.¹

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26 ¹ The government initially produced this material on July 7,
27 2021 without Bates numbering in order to provide it to counsel
28 sufficiently in advance of the motion in limine deadline. This
material was then re-produced with Bates numbers USAO_100860-102100
on October 1, 2021 to current defense counsel.

1 **III. ARGUMENT²**

2 **A. Legal Standard**

3 Federal Rule of Evidence 702 governs the admission of expert
4 testimony. It is based on the recognition that "[a]n intelligent
5 evaluation of the facts is often difficult or impossible without the
6 application of . . . specialized knowledge." Rule 702, Adv. Comm.
7 Note. Rule 702 provides:

8 A witness who is qualified as an expert by knowledge,
9 skill, experience, training, or education may testify in
10 the form of an opinion or otherwise if: (a) the expert's
11 scientific, technical, or other specialized knowledge will
12 help the trier of fact to understand the evidence or to
13 determine a fact in issue; (b) the testimony is based on
14 sufficient facts or data; (c) the testimony is the produce
15 of reliable principles and methods; and (d) the expert has
16 reliably applied the principles and the methods to the
17 facts of the case.

18 Fed. R. Evid. 702.

19 In Daubert, the Supreme Court adopted a flexible test for
20 determining whether to admit scientific expert testimony under Rule
21 702. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588 (1993).
22 The Supreme Court later extended Daubert to apply to "technical or
23 other specialized knowledge" in Kumho Tire Co. v. Carmichael,
24 526 U.S. 137, 147 (1999). However, Kumho Tire rejected the
25 proposition that the Daubert factors should be rigidly applied,
26 stating instead that those factors "may or may not be pertinent in
27 assessing reliability, depending on the nature of the issue, the
28 expert's particular expertise, and the subject of his testimony."
29 Kumho Tire, 526 U.S. at 138.

2 The government incorporates by reference the additional
3 factual and procedural background set forth in the government's
4 motion in limine No. 1 filed on July 19, 2021. (Dkt. 80.)

1 While Daubert directs trial courts to serve as “gatekeepers” by
2 excluding testimony that is genuinely unreliable, the gatekeeper role
3 “is not intended to serve as a replacement for the adversary system.”
4 Fed. R. Evid. 702, Adv. Comm. Notes (quoting United States v. 14.38
5 Acres of Land, 80 F.3d 1074, 1078 (5th Cir. 1996)). Indeed, Daubert
6 made clear that “[v]igorous cross examination, presentation of
7 contrary evidence, and careful instruction on the burden of proof are
8 the traditional and appropriate means of attacking shaky but
9 admissible evidence.” Daubert, 509 U.S. at 595. Further, the Ninth
10 Circuit has stated that Rule 702 should be “construed liberally,” as
11 a rule of inclusion and not of exclusion. United States v. Hankey,
12 203 F.3d 1160, 1168-69 (9th Cir. 2000) (testimony by expert on gang
13 activity properly admitted as specialized knowledge where expert had
14 extensive personal observations of gangs; “Rule 702 works well for
15 this type of data gathered from years of experience and special
16 knowledge”).

17 **B. Dr. Shelby's Opinion on Common Characteristics of Victims
18 Is an Appropriate Subject for Expert Testimony**

19 1. Dr. Shelby's Testimony on Sexual Abuse Will Help the
20 Jury Understand the Evidence and Determine Facts in
21 Issue

22 Dr. Shelby's proposed testimony satisfies Federal Rule of
23 Evidence 702 and should be admitted because it is relevant, reliable,
24 the proper subject of expert testimony, and not unfairly prejudicial.
25 Defendant does not dispute the relevance of the first seven noticed
26 topics of Dr. Shelby's testimony, which all relate to common traits
27 and key contexts for understanding victims of intimate partner
28 violence, including coping mechanisms, the role of power imbalances
and control, and the reasons for why a victim may at first deny or

1 minimize the abuse or delay reporting it to the authorities. (Shelby
2 Report (Topics 1-7).) Instead, defendant argues that because these
3 shared traits of victims are "common" they must therefore be "common
4 knowledge," and thus do not require expert testimony for the jury to
5 understand. (Mot. at 7-12.) Defendant further argues that Dr.
6 Shelby's testimony about victim behavior would serve only to
7 "bolster" the credibility of the victims. (Id.) Defendant is
8 incorrect.

9 The Ninth Circuit and other Courts of Appeals have routinely
10 affirmed the admission of expert testimony in cases involving sexual
11 abuse, including child abuse, where such testimony is necessary to
12 explain the relevance of conduct or behavior that is not obvious to
13 those unfamiliar with the context. See, e.g., United States v.
14 Halamek, 5 4th 1081, 1087-89 (9th Cir. 2021) (affirming admission of
15 expert testimony on behaviors commonly associated with sex
16 offenders); United States v. Bighead, 128 F.3d 1329, 1330 (9th Cir.
17 1997), overruled in part by Kumho as discussed in Halamek, 5 4th at
18 1088; see also United States v. Telles, 6 F.4th 1086, 1097-98 (9th
19 Cir. 2021) (affirming admission of behavioral expert in child abuse
20 case) (citing favorably United States v. Johnson, 860 F.3d 1133,
21 1140-41 (8th Cir. 2017) (affirming admission of intimate partner
22 violence expert in sexual abuse case)).

23 In Bighead, the government called a rebuttal expert witness to
24 explain common (but not commonly understood) behaviors of abuse
25 victims after the victim's ability to recall and to recount the
26 incidents of sexual abuse and delay in reporting the abuse had been
27 challenged on cross-examination. Bighead, 128 F.3d at 1330. The
28 Ninth Circuit held that such opinion testimony was appropriate

1 because it was based on observations of typical characteristics of
2 victims of child abuse draw from years of interviews and that it
3 would assist the jury because "it rehabilitated (without vouching)
4 for the victim's credibility after she was cross-examined about the
5 reasons she delayed reporting and about the inconsistencies in her
6 testimony." Id. at 1331. The Ninth Circuit affirmed the use of such
7 expert testimony in the government's case-in-chief in Halamek, where
8 the Ninth Circuit noted that it was conforming to the consistent
9 holding across multiple circuits that expert testimony in this area
10 in abuse cases was appropriate, so long as it did not cross the line
11 into opinions about the credibility or specific behaviors of the
12 victims in the case. Halamek, 54th at 1087-89.

13 While these cases primarily relate to child abuse, there is no
14 reason to conclude that similar testimony would be unhelpful in cases
15 involving adult sexual abuse. Testimony about victims in sexual
16 abuse cases is helpful to finders of fact because it helps illustrate
17 "[r]egardless of the victim's age, . . . how individuals generally
18 react to sexual abuse -- such as not reporting the abuse and not
19 attempting to escape from the abuser," which in turn "helps jurors
20 evaluate the alleged victim's behavior." Johnson, 860 F.3d at 1140.
21 Indeed, the rules are frequently the same across child and adult
22 sexual abuse cases, and the Ninth Circuit relied on Johnson in its
23 recent published opinion on this issue in Telles. 6 F.4th at 1097.
24 Congress for example in both types of cases has permitted a wide
25 range of propensity evidence to be admitted. Compare Federal Rule of
26 Evidence 413 with Rule 414; see also United States v. Sioux, 362 F.3d
27 1241, 1244 n.4 (9th Cir. 2004) ("We follow decisions interpreting
28 Rule 414 in cases interpreting Rule 413.").

1 As these opinions recognize, victims of abuse -- children and
2 adults -- are subject to unique pressures, and individuals involved
3 in abusive relationships often behave in a manner that would be
4 surprising to those who have not themselves been exposed to such
5 situations. Thus, an expert is both necessary and appropriate
6 because the experience of such victims is beyond the ordinary
7 experience of the typical trier of fact. So long as the expert does
8 not impermissibly "vouch" for the victim by, for example, diagnosing
9 the victim with sexual abuse or expressing an opinion that sexual
10 abuse has in fact occurred, the testimony does not necessarily invade
11 the jury's exclusive responsibility to determine the credibility of
12 witnesses. See United States v. Whitted, 11 F.3d 782, 785-86 (8th
13 Cir. 1993). Dr. Shelby's opinions do not cross that line; therefore,
14 they should be admitted.

15 2. Dr. Shelby's Testimony Will Properly Help the Jury
16 Evaluate the Credibility of the Victims and Other
17 Witnesses

18 Defendant also argues that the government may not call an expert
19 to "bolster" another witness's credibility. (Mot. at 7-12.) This
20 misstates the rule. Although the government may not call an expert
21 to directly opine on another witness's credibility, it is appropriate
22 -- and commonplace -- for an expert witness to offer testimony that
23 corroborates a witness, explains witness behavior that may appear to
24 affect their credibility, or is otherwise probative of their
25 credibility. In Bighead, for example, the government's expert was
26 called in rebuttal expressly to counter a particularly vigorous
27 cross-examination of the victim that called into question her
28 credibility because she delayed reporting and made inconsistent
statements about her abuse. The expert's explanation of why these

1 actions are common in intimate partner abuse scenarios did not
2 require the jury to conclude that the victim was credible, but
3 provided important context that would enable the jury to
4 independently evaluate whether to believe the victim.

5 In a different context, the Ninth Circuit approved expert
6 testimony on "the business of prostitution and the relationships
7 between pimps and prostitutes" for the purpose of "plac[ing] other
8 witnesses' testimony into context and provid[ing] the jury a means to
9 assess their credibility." United States v. Brooks, 610 F.3d 1186,
10 1195-96 (9th Cir. 2010) (emphasis added). In United States v.
11 Taylor, 239 F.3d 994 (9th Cir. 2001), the Ninth Circuit held that
12 expert testimony about the relationship between prostitutes and their
13 pimps was admissible to aid the jury in evaluating the credibility,
14 including to explain why a child prostitute may not have testified
15 truthfully about the relationship with her pimp in prior proceedings.
16 Id. at 998.

17 The government anticipates that defendant will attack the
18 credibility of the victims and witnesses in this case based on, among
19 other possibilities, arguably inconsistent statements, a failure to
20 report close in time to the assaults, and early efforts to minimize
21 the abuse to friends and family. Dr. Shelby's explanatory testimony
22 will help the jury place the experiences and conduct of the victims
23 into context, and give them appropriate means to evaluate their
24 credibility. Such expert testimony has been repeatedly approved by
25 the Ninth Circuit and other courts, and should be admitted here too.

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1 3. Dr. Shelby's Opinions Are Based on Sufficient Facts
2 and Data

3 Defendant also argues that Dr. Shelby's opinions fail to satisfy
4 Rule 702 because the government's notice fails to sufficiently
5 identify how she has formed her conclusions. Specifically, defendant
6 argues that Dr. Shelby should have to identify her specific sample
7 size of cases and how many of those cases were substantiated. (Mot.
8 at 7-12.) That is not the standard.

9 First, defendant's objection appears based exclusively on the
10 four-page notice letter that the government provided in July 2019,
11 not Dr. Shelby's 25-page expert report that the government produced
12 in February 2020 or the additional materials produced in July 2021.
13 (Compare Mot., Ex. A, with Shelby Report.) Dr. Shelby's Report
14 explains that she is Clinical Director of the Santa Monica-UCLA Rape
15 Treatment Center, the Director of Training and Lead Forensic
16 Interviewer in the child advocacy service at Harbor-UCLA Medical
17 Center, and the Founder/Director of Harbor-UCLA's Child Trauma
18 Clinic. (Shelby Report at 1.) At Harbor-UCLA, Dr. Shelby taught and
19 supervised psychology and psychiatry trainees in trauma-focused
20 diagnosis and treatment. (Id.) She has 50 peer-reviewed
21 presentations and publications, as well as in more than 30 additional
22 publications, and her work has focused on research-based approaches
23 to clinical care of trauma survivors. (Id.) She has been licensed
24 in the State of California since 1997. (Id.)

25 Dr. Shelby's Report expressly cites her own experience treating
26 patients along with 14 different reference citations, including
27 multiple surveys of victims of domestic violence to support her own
28 conclusions. (See, e.g., Shelby Report at 2 (citing Smith, S.G.,

1 Zhang, X., Basile, K.C., Merrick, M.T., Wang, J., Kresnow, M., &
2 Chen, J., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2015
3 DATA BRIEF - UPDATED RELEASE, National Center for Injury Prevention and
4 Control, Centers for Disease Control and Prevention (2018)).
5 Defendant cites to no case law -- and the government is aware of none
6 -- requiring an expert in this area of the law to identify exactly
7 how many patients they have treated over a 20-year career. It is
8 enough that she has the practical and academic experience necessary
9 to render the opinions she is offered to give in this case. See,
10 e.g., Halamek, 5 F.4th 1081 at 1088 (affirming introduction of expert
11 testimony in an abuse case based on expert's "[e]xtensive experience
12 interviewing victims").

13 **C. Dr. Shelby's Opinion on Common Characteristics of
14 Perpetrators Is Also Relevant and Based on Her Experience**

15 Defendant also objects to topics eight and nine, which relate to
16 common traits of perpetrators of domestic violence, on the grounds
17 that such testimony is irrelevant and outside the scope of Dr.
18 Shelby's experience. Both arguments lack merit.

19 1. Testimony about Perpetrators is Relevant

20 Topics eight and nine of the expert notice, which are more fully
21 explained in Dr. Shelby's expert report (Shelby Report at 21-25) are
22 relevant because a response by a victim experiencing intimate partner
23 violence should not be viewed in isolation. The actions that trigger
24 responses also matter, especially when they may in some instances
25 appear innocuous, but are designed to impact a victim. As Dr. Shelby
26 explains in her report, for example, "several studies reveal that
27 psychological aggression is the most prevalent form of [intimate
28 partner violence]" (Shelby Report at 22 (citing sources)) and that

1 victims of intimate partner violence face various type of "coercive
2 control" (id.). Just as Dr. Shelby's testimony can help the jury
3 understand how a victim might respond, it makes sense that she should
4 be able to testify about the inputs and how they can be used to
5 affect victims.

6 Topics eight and nine, which relate to common traits of
7 perpetrators of intimate partner abuse and how they shape their
8 victims, do not resemble the "criminal profile" testimony that
9 defendant argues was excluded in United States v. Gillespie, 852 F.2d
10 475, 480 (9th Cir. 1988). (Mot. at 6.) There, the government called
11 a clinical psychologist to rebut testimony by a defendant that he
12 "could not have molested the child." The Ninth Circuit ruled -- not
13 on expert testimony grounds but on character evidence grounds -- that
14 the defendant had not put his character into issue, and thus the
15 testimony had low probative value and was highly prejudicial.
16 Gillespie, 852 F.2d at 480. Here, Dr. Shelby's testimony is not about
17 defendant's character, or the "profile" of a domestic abuser, but
18 about commonly misunderstood behaviors used by those engaging in
19 intimate partner abuse that may appear innocuous on their face
20 (expressions of love while trying to exert control), but are designed
21 to make it difficult for victims to leave. (Shelby Report at 21-25.)

22 Dr. Shelby's testimony is more closely analogous to common
23 expert testimony on "grooming," which is routinely admitted in child
24 abuse cases.³ An explanation of grooming behavior is properly
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26 ³ In that context, "'grooming' children for sexual abuse" can
27 include "giving a child gifts and support, treating a child as
special, isolating a child from his/her social support, [and]
gradually increasing sexually explicit talk about sex through jokes"
28 and the result of the perpetrator's actions is a child is "gradually
(footnote cont'd on next page)

1 admitted because behavior "such as cuddling and paying special
 2 attention to [the victim]--that could be innocent parental behavior,
 3 could actually have been part of his plan to engage in illicit sexual
 4 activity." Id. The Ninth Circuit in Halamek, approved introducing
 5 expert testimony on grooming, citing as persuasive other circuits'
 6 reasoning that such testimony "illuminates how seemingly innocent
 7 conduct could be part of a seduction technique." Id. at 1088
 8 (streamlined) (citing United States v. Romero, 198 F.3d 576, 585 (7th
 9 Cir. 1999) ("[T]here is no question that allowing [expert testimony
 10 on modus operandi of modern child molesters] was generally proper
 11 because his testimony was helpful to the jury in understanding how
 12 child molesters operate--something with which most jurors would have
 13 little experience."); United States v. Batton, 602 F.3d 1191, 1201
 14 (10th Cir. 2010) (permitting testimony that sex offenders could be
 15 "well-respected individuals in a community who often use their
 16 positions to groom their victims into trusting them" and that this
 17 "specialized information may very well be beyond the knowledge of any
 18 jurors"); United States v. Hitt, 473 F.3d 146, 158-59 (5th Cir. 2006)
 19 ("We hold that the admission of the testimony regarding typical
 20 behavior of child molesters was not an abuse of discretion.")).

21 The modus operandi of intimate partner abusers toward their
 22 victims is similar. Dr. Shelby explained in her report for topic
 23 nine, for example, that "[c]oercive control includes attempting to
 24 limit or prevent the victim's contact with family or friends, making
 25 decisions for the victim, monitoring or demanding to know what the
 26 victim is doing, the perpetrator threatening to hurt him/herself,

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desensitize[ed] . . . to touch." Halamek, 5 4th at 1086 (describing
 expert notice) (internal quotation and citation omitted).

1 . . . taking steps to prevent the victim from leaving," etc. (Shelby
2 Report at 22.) The government anticipates testimony by a victim that
3 she believed, based on defendants statements and her interactions
4 with him, that defendant tracked her movements. The government also
5 anticipates victim testimony that defendant would park his car behind
6 hers to prevent her from leaving. Dr. Shelby's testimony is relevant
7 and would be useful to the jury to consider how the victim responded
8 to such inputs, and would also be useful to understand what a
9 perpetrator can accomplish by taking such actions. This is relevant
10 to the jury's determination of the case by understanding how victims
11 respond to defendant's actions that he could track them and prevent
12 their movement and ultimately prevent them from reporting his abuses.

13 Defendant cites generically to "Rule 704" in the title of his
14 motion and throughout, but makes no arguments as to why Dr. Shelby's
15 noticed testimony may violate the Rule. (See, e.g., Mot. at 2, 4, 5,
16 and 8.) Under Rule 704(b) of the Federal Rules of Evidence, "In a
17 criminal case, an expert witness must not state an opinion about
18 whether the defendant did or did not have a mental state or condition
19 that constitutes an element of the crime charged or a defense." Fed.
20 R. Evid. 704(b). Dr. Shelby's testimony will not violate Rule 704(b)
21 because she will not testify as to any ultimate issue, including, for
22 example defendant's mental state. She will also not opine as to any
23 specific mental state of the victims in this case. Dr. Shelby is
24 expected to testify about general characteristics of abuse victims --
25 how and why they typically do not report these crimes or try to
26 escape their abusers -- and their perpetrators -- how they groom
27 their victims and create a culture that makes the victim doubt
28 themselves and whether they will be believed. This testimony will

1 aid the jury in its own assessment of the victims' and defendant's
2 behavior in this case.

3 For all the reasons discussed above, Dr. Shelby's testimony
4 resembles the kind of expert testimony routinely admitted in abuse
5 cases because it will help the jury understand the circumstances that
6 are unique to intimate partner abuse without crossing the line into
7 vouching or opining on any specific mental state in this case.

8 **2. Dr. Shelby is Qualified**

9 Defendant also argues that Dr. Shelby's experience interviewing
10 victims of abuse does not make her qualified to opine about traits of
11 perpetrators unless she has also interviewed them. This argument was
12 squarely rejected in Halamek. Halamek asserts that Blackwell's
13 experience interviewing children did not qualify her to testify about
14 the behavior of abusers, because the experts interviews with the
15 victims included "statements about the behavior of their
16 abusers. . . . Extensive experience interviewing victims can qualify
17 a person to testify about the relationships those victims tend to
18 have with their abusers." Halamek, 5 F.4th at 1088.

19 **D. Dr. Shelby's Testimony Is Not Unfairly Prejudicial**

20 Finally, defendant argues that all of the noticed topics of Dr.
21 Shelby's testimony run afoul of Rule 403 because they are highly
22 "inflammatory." (Mot. at 6, 8, 9, 10, 11, 12.) Rule 403 provides a
23 court may exclude evidence -- even if relevant -- "if its probative
24 value is substantially outweighed by a danger of . . . unfair
25 prejudice, confusing the issues, [or] misleading the jury." Unfair
26 prejudice is defined as having an "undue tendency to suggest
27 decision on an improper basis, commonly, though not necessarily, an
28 emotional one." Hankey, 203 F.3d at 1172.

1 As discussed extensively above, the Ninth Circuit has repeatedly
2 approved of expert testimony substantially identical in nature to
3 that of Dr. Shelby. There is little risk of unfair prejudice to
4 defendant. The jury may or may not conclude that the victims are
5 credible in this case even if they accept and understand Dr. Shelby's
6 opinions about how intimate partner violence makes it difficult for
7 victims to report. This, even if the jury fully credits her
8 testimony, because she is providing background information and
9 hypothetical testimony about similar situated typical actors, the
10 jury may conclude that either the victims or defendant are atypical,
11 and that her testimony does not apply to them.

12 Finally, to mitigate any risk of prejudice, the government
13 intends to propose Ninth Circuit Model Criminal Jury Instruction No.
14 4.14, cautioning jurors that they should treat expert testimony like
15 any other testimony, and are free to accept or reject it. In light
16 of the inferences the jury will have to draw independent of Dr.
17 Shelby's testimony, the jury instruction cautioning jurors against
18 simply accepting Dr. Shelby's testimony because she is an expert, and
19 substantial Ninth Circuit case law supporting the admissibility of
20 similar testimony, Rule 403 does not bar Detective Reed's testimony

21 **E. No Daubert Hearing is Required**

22 Although defendant has challenged the bases of Dr. Shelby's
23 opinions, defendant has not asked for a Daubert hearing. No such
24 hearing is necessary in this case. Trial courts are not compelled to
25 conduct separate, pretrial Daubert hearings to discharge their
26 gatekeeping duties outside the presence of the jury. United States
27 v. Alatorre, 222 F.3d 1098, 1102-05 (9th Cir. 2000). Here,
28 defendant's challenge was based on only the four-page notice provided

1 by the government, not Dr. Shelby's 25-page report, which fully and
2 completely sets forth her opinions and their bases, including
3 citations to extensive research studies and other relevant
4 literature.

5 Relying on the inherent flexibility of the Daubert standard, as
6 explained in Kumho, the Ninth Circuit has made clear that specific
7 Daubert factors have no application to an expert whose expertise is
8 based on training and experience, rather than the application of a
9 specific methodology. See Hankey, 203 F.3d at 1169 (holding that
10 Daubert factors "simply are not applicable to this kind of testimony,
11 whose reliability depends heavily on the knowledge and experience of
12 the expert, rather than the methodology or theory behind it."). Dr.
13 Shelby's testimony is based on his 25 years of experience treating
14 victims of intimate partner violence. The government has also
15 provided defense in July and October 2021 with Dr. Shelby's five-year
16 record of forensic testimony, with citations to cases and whether she
17 was retained by plaintiffs or defendants. Therefore, a Daubert
18 hearing is unnecessary to determine the reliability of her testimony
19 because such testimony will be based on her training and extensive
20 experience working with these types of victims. However, to the
21 extent the Court deems a hearing necessary, Dr. Shelby is ready and
22 available to attend such a hearing.

23 **IV. CONCLUSION**

24 For the foregoing reasons, the government respectfully requests
25 that this Court deny defendant's amended motion in limine to exclude
26 or limit "sexual assault expert" testimony (dkt. 83).
27
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